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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EXPEDIENT SERVICES, INCORPORATED and JOHN CURRY, RALH RHINELANDER, and RICHARD FRAZIER on behalf of themselves an all others similarly situated,

Petitioners,

v.

JAMES M. BEGGS, Administrator of the National Aeronautics and Space Administration, and RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor,

Respondents.

PETITIONERS' REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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EDITOR'S NOTE

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I. INTRODUCTION

The respondents in their Brief In Opposition ["Opp. Brief"] have attempted to minimize the importance of the issues presented to the Court in the Petition for Writ of Certiorari. ["Pet."]. The Solictor misstates certain facts, misunderstands the questions presented, and attempts to create the illusion that this case is weighted down with simplistic facts inappropriate for Supreme Court review. This is not, however, the case.

Many of the facts in the underlying cause of action were the subject of a stipulation between the parties. (See Pet. at 26 A-29A). The remainder of the underlying facts had been decided at trial and are not now subject to revision or question by the respondents. The Response, then, is a thinly veiled attempt to sidetrack the Court from the importance resolving of the issues presented.

The government failed to address: 1) whether the coerced acts of some members of a certified class moot the injuries of the entire class; and 2) when are the real injuries of an entire certified class of such diminimus proportions that the claims of the entire class become moot?

The respondents do not rebut any of the legal arguments raised by the petitioners. Instead, they submit that there is no conflict in the circuits on the issues presented. The reason being that the issue of mootness had long ago been decided by this court. (See Pet. at 11-15).

If the government successfully prevents this court's review of the erroneous lower court decisions, then the law of mootness in class actions shall certainly be thrown into turmoil.

II. THE RESPONDENTS' MISCHARACTERIZE AND MISSTATE THE QUESTIONS PRESENTED TO THIS COURT.

Respondents have continually attempted to characterize this action at each juncture of the appellate process as having become moot because some of the petitioner-employees had involuntarily terminated their employment relationship with the petitioner-employer, joined a union, and because the petitioner-employer (ESI) had ceased doing business with the government.

The Solicitor mistakenly characterizes the employee-petitioners injuries as having ceased when they joined a union. (See Opp. Brief at 7 n. 6). This posture displays respondents continuing misunderstanding of the mootness doctrine as well as the facts in this case. Of the petitioner-employees who were subsequently offered employment with EG&G (the successor contractor to ESI) and who admittedly

elected to join a union, they did so only to protect their wages from further erosion because of their non-union status. (See Pet. at 31A-33A).

However, regardless of whether some petitioner-employees joined a union, there still remains to be decided the rights of the class action petitioner-employees who were not offered employment by the successor employer, EG&G, and those other workers who did not join the union. Further, as to those employees who were not employed by EG&G, and those employees who were employed by EG&G and did join a union and still suffered financial injury, all of their claims were not moot.

As has so often been stated, mootness cannot occur so long as there is a live controversy, and any unremedied real injury is sufficient to sustain the controversy. Memphis

Light, Gas, and Water Division v. Croft, 436 U.S. 1, 8-9, (1978); Powell v. McCormack, 395 U.S. 486, 497 (1969); Firefighters Local Union No. 1784 v. Stotts, _____ U.S. _____, 104 S.Ct. 2576, 2584 (1984). Here, the petitioner-employees, both union and non-union, continue to suffer injuries of not only a financial nature, but of a constitutional magnitude as well. (Pet. at 10a).

Regarding the claims of the petitioner-employer the same standards of mootness are applicable. The employer, ESI, still has a grievance outstanding which has never been finally decided. (Pet. at 12, n. 6). It's claims therefore, cannot be said to be moot.

III. THE RESPONDENTS MISUNDERSTAND THE FACTS OF THIS CASE

To resolve the questions presented, one must understand the facts of this case

as they are affected by the law of mootness. The government's failure to understand the facts of this case makes it is impossible for them to argue that this case is moot.

Contrary to the Solicitor's argument (Opp. Brief at 4 n.3), the petitioners challenged each aspect of the district court's first opinion. (Pet at 11-25). Those issues not explicitly appealed were done so implicitly in the appeal of another issue. Specifically, the issue of petitioners seeking the recovery of suspended wage increases travelled with the appeal of the issue of the constitutionality of the Service Contract Act, 41 U.S.C. §351 et. seq. ["Act"], as the two issues were and are inextricably intertwined.

Also contrary to the Solicitor's contention (Opp. Brief at 7 n. 6), the financial injury suffered by ESI remains unabated. The government had ample opportunity at both the trial and

appellate levels to argue that ESI suffered no injuries and that its claims were moot. However, as supported by the record, ESI suffered expenses in excess of $10,000 which were directly attributable to the actions of the respondents in not permitting ESI to bid competitively upon and receive an award of a contract. See Transcript at 95, 105-08.

Another glaring misunderstanding of the facts in question is exemplified by the Solicitor's statement that the employees of ESI chose to decertify their union while employed by ESI. (Opp. Brief at 7 n. 6). The petitioner-employees did not decertify the IAM, rather, the employees of ESI elected not to be represented by a union; the two situations are not the same. See Pls Ex. Nos. 42-44, R. 426-27.

Finally, the government's argument that petitioners sought only prospective relief

(Opp. Brief at 8) is also erroneous. The petitioner's Third Amended Complaint in addition to seeking that certain sections of the Act be declared unconstitutional and other relief, sought to have their wages accurately reflected in the wage determinations that were issued prior to and after the original complaint in this action was filed. See Count VI, Paragraph 46 of Plaintiffs Third Amended Complaint. This request for relief was not merely prospective.

IV. THE QUESTION OF MOOTNESS PRESENTED TYPIFIES THE SERIOUS LEGAL ISSUES REQUIRING RESOLUTION BY THE COURT.

The Solicitor has inadequately addressed the issue of mootness as presented by the petitioners. The Solicitor relies on only two arguments to rebut the Petition for Writ of Certiorari. First, the government argues that the petitioners sought only pro-

spective relief in seeking the Act declared unconstitutional. As noted above, petitioners Third Amended Complaint clearly sought monetary damages relating back to July, 1981. (The Third Amended Complaint was filed in May, 1982. The original complaint was filed on January 31, 1981). Clearly, then, the petitioners herein did not and do not now seek merely prospective relief.

Second, the Solicitor argues that declaring the challenged portions of the SCA unconstitutional would not redress the financial injuries suffered by the petitioners-employees. This argument is at best superfluous, at worst a continuing misunderstanding of the facts at issue.

The petitioner-employees while employed by ESI received wages and fringe benefits higher than paid to their peers employed by other contractors. At that time, the petitioner-employees were protected from a wage and benefit reduction because of the

protection afforded employees of successor non-union employers. Once the government awarded the base wide contract to EG&G, the non-union class action petitioner-employees were no longer protected by the Act. Because of this failure of the Act to protect the wages of non-union employees, the employees were informed by EG&G that the wages and fringe benefits that they would receive would be substantially less than the wages of the other EG&G employees who were unionized. (See Pet. at 31A-33A).

Facing, in many cases, financial ruin, the non-union petitioner-employees "voluntarily" elected to join the union representing other EG&G employees. Once covered by the collective bargaining agreement the class action employees received the same wages as other EG&G employees, but those wages and fringe benefits were less than they were receiving as non-union employees of ESI.

An affirmative ruling on Count VI of the Third Amended Complaint would afford the petitioner-employees the financial relief they sought at trial. Removal of the mootness block in this case would permit on remand a declaration that the discriminatory provisions of the Act are unconstitutional and would free employees to fairly choose whether or not they wanted to be represented by a collective bargaining agent. Such a declaration would lift the coercion implicit in the Act and afford full First Amendment Rights to service contract employees. This would remedy the constitutional intringements alleged by the petitioners in a reviewable decision of the Eleventh Circuit.

V. CONCLUSION

The lower court decision misapplying the

law of mootness must not be allowed to stand. A failure by the Court to review the serious issues presented would create a result totally at odds with the law of mootness as crafted by this court.

Respectfully submitted,

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